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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

U S WEST COMMENTS

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Executive Summary

The line separating private from common carrier mobile services has been a source of controversy since the Commission established private land mobile services over four decades ago. Congress hoped to end the "considerable litigation" in 1982 by defining private land mobile services in such a way as to establish a "clear demarcation" between private and common carrier mobile services.

Congress' 1982 regulatory scheme has not worked as anticipated because licensees were given the freedom to choose whether they would be treated as a private or a common carrier. It is understandable why many licensees chose the private classification. Not only have private carriers been free of all state regulation and most federal regulation (all but interference requirements), but they also have been allowed to provide the same set of services as common carriers and were even permitted to provide services common carriers were barred by regulation from offering.

For example, one private carrier recently told investors not only that it provides service "functionally equivalent" to cellular service, but that its service offering is actually better than cellular because, unlike cellular, it alone can offer "one-stop shopping" as a result of its "unique" ability to offer an "integrated package of services," including "private radio networks (dispatch)." This "private" carrier can make this claim, not because it has skills or technology cellular carriers do not possess, but because cellular

carriers have been forbidden by regulation from offering their customers a full range of services, such as "private radio networks (dispatch)."

Congress itself has noted that, notwithstanding its 1982 Act, private carriers had become "indistinguishable from common carriers" because they have been allowed to provide "what are essentially common carrier services." Yet, private carriers had been able to "retain[] private carrier status," resulting in the provision of similar services under "inconsistent regulatory schemes." Congress was concerned that "the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private."

Congress therefore determined that an entirely new scheme was necessary, and it established two fundamental principles which would serve as the foundation of its new regime: (1) "securing regulatory parity" for all mobile services; and (2) expanding the class of mobile service providers regulated as common carriers to include those private carriers providing service to some segment of the public on a commercial basis. To achieve these goals, Congress scrapped the former definitions of private and common carrier mobile services and established entirely new classifications: commercial mobile services ("CMS"), and private mobile services ("PMS"), the latter statutorily defined as a service that is "not a commercial mobile service or the functional equivalent of a commercial mobile service."

U S WEST demonstrates in these comments that defining CMS expansively (and, accordingly, PMS narrowly) better discharges Congressional intent, better protects consumers and better facilitates the development of a truly competitive market.

U S WEST also demonstrates that the Commission should accept Congress' invitation to expand the set of services CMS providers can offer. The public interest would be served if the current restrictions on common carrier mobile services were removed so CMS providers could provide to the American public a full range of services, including virtual private radio network (dispatch) services.

Finally, U S WEST demonstrates that the Commission should exercise in full the forbearance authority Congress has given it. The mobile services market has always been competitive, and the Commission, for the most part, has not imposed on this market such monopoly-designed regulatory devices as rate, entry and accounting regulation. While courts have questioned the Commission's forbearance authority, Congress has given the Commission express authority to forbear from regulating providers of commercial mobile services. This action is powerful evidence that Congress concurs with this Commission's past forbearance practices in the mobile services market, practices which become even more compelling as the Commission is about to license a new set of commercial mobile service providers, thus intensifying the level of competition in the mobile services market.

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U S WEST COMMENTS

U S WEST, Inc. submits these comments in response to the Notice of Proposed Rulemaking, FCC 93-454 (Oct. 8, 1993)("Notice"), issued to "create a comprehensive framework for the regulation of mobile radio services" in response to recent amendments to Sections 3(n) and 332 of the Communications Act of 1934.[1]

I. An Expansive Definition of "Commercial Mobile Services" Is Both Appropriate and Necessary

Congress, in amending Section 332, has grouped all mobile services into one of two categories: "commercial mobile services" ("CMS"), or "private mobile services" ("PMS"). While this amended statute defines both services, Congress has charged this Commission with further defining certain components of these definitions to establish a clear line of demarcation between CMS and PMS services. It cautioned the Commission, however,

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[1]The amendments to Sections 3(n) and 332, enacted as part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (Aug. 10, 1993), are hereafter referred to as "Amended Section 3(n)" and "Amended Section 332."

"to ensure that such regulation is consistent with the overall intent of this subsection . . . so that, consistent with the public interest, similar services are accorded similar regulatory treatment."[2]

As shown below, defining CMS broadly (and, consequently, PMS narrowly) better fulfills the intent of Congress in "securing regulatory parity" among carriers providing mobile services to the public,[3] better promotes the public interest, and better facilitates the development of a truly competitive market for mobile services.

A. A Broad CMS Definition Would Better Execute Congressional Intent

It is clear from the context in which Congress acted, the language of the Budget Act itself, and the legislative history that Congress intended a broad definition of CMS. The first and only time Congress addressed mobile radio services was 11 years ago in adding Section 332 to the Communications Act.[4] This statute was enacted to end the "considerable litigation" between private land mobile operators and radio common carriers regarding which services were common carrier in nature (and therefore subject to regulation) and which services were non-common carrier in nature (and

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[2]H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494 ("Conference Report"), *reprinted in* 1993 U.S. Code Cong. & Admin. News 1088, 1183.

[3]Conference Report, note 2 *supra*, at 495. *See also* id. at 497.

[4]Communications Amendments Act of 1982, Pub. L. 97-259, Title I, § 120(a), 96 Stat. 1087, 1096-97, *codified at* 47 U.S.C. § 332.

not subject to regulation).[5] Congress hoped to achieve this end by defining private land mobile services in such a way as to establish a "clear demarcation" between private and public mobile services:

> The basic distinction set out in this legislation is a functional one, *i.e.*, whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier. If not, [the new provision] clarifies that private systems may be interconnected with the public switched telephone network under the tests [specified in the new section].[6]

This regulatory scheme did not work as anticipated. As Congress noted recently, notwithstanding its 1982 Act, private carriers had become "indistinguishable from common carriers" because they had been allowed to provide "what are essentially common carrier services."[7] Nevertheless, private carriers had been able to "retain[] private carrier status," resulting in the provision of similar services under "inconsistent regulatory schemes."[8] Congress was concerned that "the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private."[9]

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[5]H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 54, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2237, 2265, 2298. *See generally* Telocator Network v. FCC, 761 F.2d 763 (D.C. Cir. 1984).

[6]1982 U.S. Code Cong. & Admin. News at 2299.

[7]H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259-60 ("House Report"), *reprinted in* 1993 U.S. Code Cong. & Admin. News 378, 586-87.

[8]House Report, note 7 *supra*, at 259-60.

[9]Id. at 260.

Congress therefore determined that an entirely new scheme was necessary to eliminate existing regulatory disparities and to protect consumers, and it established two fundamental principles which would serve as the foundation of its new regulatory regime. First, it decided that "regulatory parity" should be the touchstone of all mobile services:

> Regulatory parity. This section amends section 332(c) to provide that services that provide equivalent mobile services are regulated in the same manner. It directs the Commission to review its rules and regulation to achieve regulatory parity among services that are substantially similar.[10]

Second, Congress determined that the class of mobile service providers regulated as common carriers should be expanded to include commercial segments of the industry now classified as private carriers (which are under no obligation to provide interconnection or services on a non-discriminatory basis):

> In addition, the legislation establishes uniform rules to govern the offering of all commercial mobile services. Uniform rules are needed to ensure that all carriers providing such services are treated as common carriers under the Communications Act of 1934.[11]

To achieve these objectives, Congress adopted a new classification of mobile services — commercial mobile services — which it defined as a service that is (1) "provided for profit," and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public."[12] Private mobile ser-

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[10]Id. at 259. *See also* Conference Report, note 2 *supra*, at 495 and 497.

[11]House Report, note 7 *supra*, at 259.

[12]*See* Amended Section 332(d)(1), 107 Stat. 395-96.

vices, in contrast, were redefined as any mobile service that is "not a commercial mobile service or the functional equivalent of a commercial mobile service."[13] Congress thus excluded from the new PMS category not only entities engaged in CMS, but also those entities providing services similar to CMS even though the services do not fit precisely within the CMS definition. As the accompanying Conference Report states unequivocally:

> [T]he definition of "private mobile service" is amended to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service.[14]

That Congress' overarching purpose was to expand the definition of common carrier mobile services to include commercial private carriers is clear from the statutory language and the changes Congress made to the prior law. This purpose is first evident in the definition of commercial mobile services. Although common carrier services had historically been limited to services provided to the public on an indiscriminate basis,[15] Congress chose to expand the definition of common carrier mobile services to include not only services provided "to the public," but also services provided "to such classes of eligible users as to be effectively available to a substantial portion of the public."[16] Moreover, Congress made clear that its CMS definition "encompasses all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion

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[13]*See* Amended Section 332(d)(3), 107 Stat. 396 (emphasis added).

[14]Conference Report, note 2 *supra*, at 496 (emphasis added).

[15]*See, e.g.*, NARUC v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 922 (1976).

[16]Amended Section 332(d)(1), 107 Stat. 395-96.

of the public" and that it is no longer relevant whether services are offered to the public at large.[17]

Other provisions of amended Section 332 make explicit Congress' intent to reclassify commercial private carriers as common carriers. This intention is apparent from the transition provisions which give current private (but commercial) carriers additional time before they must comply with the foreign ownership restrictions (applicable to mobile common carriers only) and before they can be regulated as common carriers.[18] This intention is also apparent from Congress' directive that the rules the Commission adopts in this rulemaking, to the extent they "apply to a service that was a private land mobile service and that becomes a commercial mobile service (as a consequence of such amendments), shall . . . assure that licensees in such service are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services."[19]

Finally, the intention to classify commercial private carriers as CMS providers is apparent from the statutory definition of private mobile ser-

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[17]Conference Report, note 2 *supra*, at 496 (emphasis added).

[18]*See* Amended Section 332(c)(6) and Section 6001(c)(2)(B), 107 Stat. 395 and 396. *See also* Conference Report, note 2 *supra*, at 495 ("One effect of the denomination of commercial mobile services as common carrier services is to broaden the range of services subject to limitations on foreign investment."). This intention is also apparent by the section empowering the Commission to continue to treat the provision of satellite capacity as non-common carrier activity. *See* Revised Section 332(c)(5), 107 Stat. 395. This provision would not have been necessary if Congress wanted the Commission to have considerable latitude in classifying carriers as private or common carriers.

[19]Budget Act, § 6002(d), 107 Stat. 397.

vices. In defining PMS as a mobile service that is "not a commercial mobile service or the functional equivalent of a commercial mobile service,"[20] Congress made indisputable that, in close cases, a mobile service provider should be classified as a commercial provider rather than a private provider.

It is clear, therefore, that Congress' chief objective was to achieve regulatory parity among commercial mobile service providers and that, in achieving this objective, it wanted all "commercial" mobile radio licensees to be regulated as common carriers and thus classified as providers of CMS rather than PMS.

Despite the clear language of the statute and the unambiguous statements of Congressional intent, the Notice suggests that the legislation is perhaps susceptible to a different, completely opposite interpretation. Specifically, as one alternative ("Alternative I"),[21] the Notice suggests that "a service [falling] within the literal definition of a commercial mobile service could nonetheless be classified as private if . . . it was not functionally equivalent."[22] The Notice acknowledges that the "practical effect of this interpretation would be to expand . . . the potential number of mobile services

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[20]Amended Section 332(d)(3), 107 Stat. 396 (emphasis added).

[21]The other alternative suggested in the Notice is consistent with U S WEST's position that "a mobile service that did not squarely meet the statutory test for commercial mobile service could still be classified as a commercial service if we determined that it was a 'functional equivalent.'" Notice at 11 ¶ 31.

[22]Id. at 10-11 ¶ 29 (emphasis in original).

that would be classified as private as opposed to commercial mobile services."[23]

The sole basis cited in support of Alternative I is the following sentence in the Conference Report:

> The Commission may determine, for instance, that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that . . . does not employ frequency or channel reuse or its equivalent . . . and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area.[24]

This statement does not support the proposition for which it is cited. At the outset, the statement could not be referring to a "service [falling] within the literal definition of CMS" because it does not describe a service provided "for profit" — an essential element of CMS service. Importantly, the statement immediately follows the "neither/nor" language that makes indisputable that the functional equivalency analysis applies only to those services which do not meet the CMS definition:

> [T]he definition of "private mobile service" is amended to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service.[25]

Moreover, given that the Alternative I interpretation implausibly presupposes that there are commercial mobile services which, though meeting the CMS definition, nevertheless would not be the functional equivalent of CMS,

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[23]Id. at 11 ¶ 29 (emphasis added).

[24]Conference Report, note 2 *supra*, at 496.

[25]Ibid. (emphasis added).

the conclusion is inescapable that the statement quoted above does not support Alternative I.

More importantly, Alternative I is incompatible with the plain meaning of the statute. Revised Section 332(d)(3) states unequivocally that "private mobile service . . . is not a commercial mobile service."[26] This unambiguous language is flatly inconsistent with the contention under Alternative I that a service falling within the CMS definition can nonetheless still be a PMS. Moreover, the use of the word "or" in Revised Section 332(d)(3) before the phrase, "the functional equivalent of a commercial mobile service," must be read in its ordinary context — that is, the "or functional equivalent" clause refers to services in addition to those services that meet the CMS definition.

For all these reasons, commercial mobile services should be defined broadly to ensure the elimination of all existing regulatory disparities among persons providing mobile services to the public.

B. A Broad CMS Definition Will Facilitate the Development of a Truly Competitive Market and Will Better Protect Consumers

1. Development of a Truly Competitive Mobile Services Market. Historically, private carriers and common carriers have been subject to widely disparate regulatory treatment. This state of affairs was allowed to con-

[26]It is axiomatic that the "starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" Good Samaritan Hospital v. Shalala, 61 U.S.L.W. 4554, 4556 (1993), *quoting* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). *See also* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947)("There is however no ambiguity in this act to be classified by resort to legislative history.").

tinue despite the fact that many private carriers have been providing services that, in all material respects, are identical to common carrier services. For example, NEXTEL Communications (formerly Fleet Call) is currently classified as a private carrier and, as a result, is free from most state regulation and is subject only to minimal federal regulation (inter-ference standards only). Nevertheless, as NEXTEL freely acknowledges, it competes directly with cellular carriers who, having been classified as common carriers, can be subjected to state regulation and are subject to some of the provisions of Title II of the Communications Act:

> The fact is, that often, [cellular and SMR customers] are the very same customers! Surveys show that in a lot of businesses, you'll find people with their cellular phone on the front seat, dispatch radio on the dash and a pager hooked to the belt. That's the customer that we believe will be most attracted to our integrated package of services.
>
> NEXTEL is uniquely capable of providing a single source to meet that customer's communications needs. * * * Our goal is . . . to cut down on the customer's administrative expense by integrating what was once separate pager, cellular, phone and dispatch services. One-stop shopping has great appeal to both businesses and consumers. * * * [O]ur integrated package of high quality services — mobile phone, paging, private networks (dispatch) and data — is exactly what the market wants. * * * And SMR and cellular spectrum are functionally equivalent![27]

NEXTEL can "uniquely" offer its "integrated package" of services, not because it has skill, ingenuity or technology which cellular carriers do not possess, but because cellular carriers, classified as common carriers, are

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[27]NEXTEL Communications, Inc. 1993 Annual Report at 6-7. *See also* "Nextel to Expand Acquisition Spree with PowerFone," ("Nextel and its primary competitors, Dial Page Inc. of Atlanta and CenCall Communications Inc. of Denver . . . are likely to compete with established cellular players in many large urban markets."), The Wall Street Journal, October 28, 1993, Section B, page 6, column 6.

precluded by regulation from offering all the services NEXTEL can offer (*e.g.*, private radio networks such as dispatch).

Congress recently noted that the previous statutory regime did not result in a level playing field because mobile service providers were offering "indistinguishable" services, yet operating under "inconsistent regulatory schemes."[28] Indeed, the very reason Congress amended Section 332 was because of its determination that continued "disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services."[29] In this regard, the Chair of the House Telecommunications Subcommittee made clear that the revised Section 332 was intended to ensure that the private/common carrier distinction would not be permitted to create regulatory disparities among mobile services:

> [W]hat the legislation proposes is that any person providing commercial mobile services, which is broadly defined to include PCS, and enhanced special mobile radio services, and cellular-like services, should all be treated similarly.[30]

Consumers benefit by vigorous competition. However, competition cannot be vigorous if some service providers can "game" the system by operating under a different set of rules *vis-a-vis* their competitors. To promote the development of a truly competitive mobile service market and to ensure that competition is based on such factors as skill and ingenuity, it is necessary to eliminate, to the maximum extent possible, regulatory disparities

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[28]House Report, note 7 *supra*, at 260.

[29]Ibid.

[30]Statement of Rep. Edward J. Markey, Mark-up of Budget Reconciliation, Subtitle C, Licensing Improvement Act of 1993 at 3 (May 11, 1993)(emphasis added).

among persons providing mobile services to the public. A broad definition of CMS will assure attainment of this goal.

2. Protection of Consumers. Notwithstanding the amendments to Section 332 of the Communications Act, there will remain substantial differences in the regulatory treatment of CMS and PMS providers (even assuming the Commission exercises in full its forbearance authority):

CMS Providers	PMS Providers
• Must offer interconnection upon reasonable request	• Can refuse reasonable requests for interconnection
• Cannot discriminate	• Are free to discriminate
• May be subject to additional regulation	• Are free from all state and most federal regulation (other than technical interference requirements)
• May have only limited foreign ownership	• Can be owned entirely by foreign companies or governments
• Must defend Section 309 petitions to deny	Need not defend petitions to deny

These differences underscore the desirability of classifying the broadest range of services under the CMS designation. Indeed, Congress has determined that the public interest is disserved if consumers of mobile services are denied "the protections they need if new services such as PCS were classified as private."[31] Congress has further made apparent that a non-discrimination requirement, the obligation to provide interconnection

[31]House Report, note 7 *supra*, at 260.

upon reasonable request, and the right to file complaints against mobile services providers are absolutely necessary to protect consumers.[32]

Congress' concern with the protection of consumers will not be addressed with a narrow definition of CMS. This is because, with a narrow CMS definition, some carriers will be offering private (but commercial) service to the public, and these consumers will be denied the protections afforded by Sections 201, 202 and 208 of the Communications Act — protections Congress has determined are absolutely essential for consumer protection. These public policy concerns and the clear Congressional intent to protect consumers, give added force for defining broadly the statutory definition of commercial mobile services.

II. The CMS Definition Adopted Should Be Based Upon the Congressional Intent, Sound Public Policy, and the Development of a Competitive Market

The Commission does not act in a vacuum in defining commercial mobile services because Congress has established clear guidelines which must govern the Commission's deliberations. Specifically, the CMS definition ultimately adopted must ensure regulatory parity, maximize the class of entities regulated as common carriers (and, therefore, subject to Sections 201, 202 and 208), and promote the development of a competitive mobile services market for the benefit of consumers. Thus, as demonstrated above, an expansive, rather than a narrow, definition of CMS is necessary to satisfy the Congressional mandate.

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[32]This intention is apparent from Congress' decision to exclude from the Commission's forbearance authority Sections 201, 202, and 208 of the Communications Act.

Within the context of these guiding principles, the Commission has been given a certain degree of flexibility to determine the appropriate scope of CMS by defining its various components. U S WEST encourages the Commission to steer clear of unnecessarily technical and narrow definitions that would require ad hoc determinations each time a new service is introduced or an existing service is enhanced.[33]

Revised Section 332(d)(1) defines CMS as a mobile service which (1) is "provided for profit," (2) makes "interconnected service" available, and (3) makes such service available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." Each component of this definition is discussed below.

1. For Profit. Neither the statute nor the legislative history defines the term "for profit." Because this term is used to distinguish between "commercial" and "private" mobile services, it would be appropriate to construe "for profit" as the provision of services on a commercial basis as opposed to services for internal use only. Such an interpretation would be consistent with that afforded the term "for profit" in other federal statutes. For example, for purposes of the Copyright Infringement Act, "for profit" has been defined as having the intention to profit:

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[33]*Compare* PCS Second Report and Order, GEN Docket No. 90-314, FCC 93-451, at 47 ¶ 109 (Oct. 22, 1993)("[W]e conclude that a clear ownership test is better than one turning on fine legal distinctions of what constitutes 'control.'"); Competitive Bidding Rulemaking, PR Docket No. 93-253, FCC 93-455, at 6 ¶ 18 (Oct. 12, 1993)("[A]ny sytem that we promulgate should be simple and easy to administer."); id. at 10 ¶ 29 ("Such a result would also be administratively efficient because it would eliminate the necessity of determining the nature of the use being made of a particular license."); id. at 11 ¶ 31 ("Although, in theory, we could examine individual applications to determine their principal use, this would be virtually unworkable because of the heavy administrative burden such determinations would place on the Commission.").

> [F]or profit doesn't mean whether or not the person actually makes a profit, but whether or not he is engaged in a business to hopefully or possibly make a profit. . . . It is irrelevant whether the hope of gain was realized or not. The requirement of profit is intended to delineate commercial infringements from infringements for merely personal use and philanthropic infringements.[34]

Such a definition would allow non-commercial licensees — government, public safety and entities using spectrum for internal use only — to remain classified as private, but would avoid the need for a case-by-case analysis of whether a given licensee's service is, in fact, profitable or likely to be so. Such a definition would, moreover, be consistent with a similar provision contained in the recently amended Section 309(j) of the Communications Act.[35]

One fact is clear: unlike the prior version of Section 332 as interpreted by the Commission, the "for profit" test is not applied solely to the interconnected portion of a service. A commercial operation should not be able to obtain an artificial competitive advantage (by obtaining PMS status) merely because (it says) it passes through its interconnection costs without mark-up, while making a profit on the total service offering. These are the very types of fictions which Congress wants removed.

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[34]United States v. Wise, 550 F.2d 1180, 1195 (9th Cir. 1977). *See also* North Ridge Country Club v. Commission of Revenue, 877 F.2d 750, 756 (9th Cir. 1989)("For profit" in the Internal Revenue Code means only that one "undertakes [an] activity with the intent to profit."); Weir v. Commission of Revenue, 109 F.2d 996, 998 (3d Cir. 1940)("for profit" means the intention to produce taxable income).

[35]In that revised statute, Congress stated that competitive bidding is appropriate when the use of the spectrum "will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers." Amended Section 309(j)(2)(A). *See also* Competitive Bidding Rulemaking, PR Docket No. 93-253, at 9 ¶ 25 (Oct. 12, 1993).

In summary, U S WEST agrees with the Commission that only "government and non-profit safety services" and "businesses that operate mobile radio systems solely for their own private, internal use" should be outside the scope of the CMS definition.[36]

2. Interconnected Service. Interconnected service is defined as a service "interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending."[37] The legislative history makes clear that more than mere physical interconnection is required; an "interconnected service" must be provided to a carrier's customers.[38]

The meaning of "interconnected service" must be gleaned from the perspective of the using public.[39] After all, it is the public to whom an "interconnected service" is provided. To the public, an interconnected service

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[36]Notice at 4 ¶ 11 (emphasis added). The Notice suggests that it may be appropriate to treat as a PMS provider a licensee who sells excess capacity because "[u]nder current rules, private land mobile licensees may share facilities that they use internally with other users on a for-profit, private carrier basis." Id. at 4 n.11. Current Commission rules and past practices should not be used in defining new legislation especially where, as here, the legislation was enacted precisely because current practices resulted in "disparities" which Congress found objectionable.

[37]Amended Section 332(d)(2), 107 Stat. 396.

[38]*See* Conference Report, note 2 *supra*, at 496. As the Commission correctly notes, the service-to-the-end-user requirement excludes from CMS classification "certain 'private line' type services [that] might interconnect with and use facilities of the public switched network, but that a subscriber would be able to send or receive messages only between limited points in the network." Notice at 5 ¶ 16.

[39]It would not be productive to define the statutory phrase "interconnected service" through use of prior Commission precedent because such precedent has evolved in other contexts and has been less than uniform. Besides, past decisions would appear to have little value in defining a new statutory phrase that did not exist at the time the decisions were rendered.

surely means the ability to transmit to or receive communications from other members of the public.[40]

Some services allow the transmission or receipt of communications on a real-time basis; other services allow transmissions only on a delayed, store-and-forward basis. While the speed by which a communication is consummated may implicate the value of a service to consumers, such timing factors do not change the overall character of the service. So long as a consumer can receive (or send) communications, the consumer receives an "interconnected service."

Attempting to define interconnected service more narrowly, using such criteria as direct or real-time connections, would result in the very regulatory and technical disparity Congress has sought to eliminate. With such a distinction, commercial providers could gain an artificial competitive advantage (by obtaining PMS status) merely by delaying a communication for a fraction of a second.[41]

Under any definition of "interconnected service" with the "public switched network," the Commission should minimize the potential for manipulation through the use of intervening private facilities (be they non-common carrier facilities or dedicated private lines). The use of private mi-

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[40]*Compare* Amended Section 309(j)(2)(B), 107 Stat. 388, describing an arrangement enabling "subscribers to receive . . . or . . . to transmit directly communications signals."

[41]Moreover, enforcement of Commission rules would difficult, if not impossible, if licensees were free to avoid CMS classification by merely delaying (or saying they planned to delay) the communication for a fraction of a second. Once the PMS classification were obtained, licensees could easily modify their equipment to provide a direct or real-time connection — activity that would be most difficult to detect.

crowave channels, optical fiber links, dedicated lines or other third-party facilities between a provider's switch and the interconnection point with the public switched network is irrelevant to a determination whether "interconnected service" is available to consumers. The focus should be on whether the service offered to consumers meets the statutory definition, not whether the licensee uses third-party facilities to reach the public switched network.

In summary, the statutory phrase, "interconnected service," should be defined using its plain meaning — that is, service which allows mobile service customers to receive telecommunications from or to send telecommunications to members of the public — regardless of whether the transmission is completed on a real-time basis.

3. Available to the Public or Classes of Eligible Users. Revised Section 332(d)(1) classifies service as CMS if it is made available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission." This component of the CMS definition gives the Commission some flexibility to define which entities should be regulated as common carriers although, as the Commission correctly notes, it is "clear that Congress intended to include some existing private services within the scope of its [CMS] definition even if they are not offered to the general public without restriction."[42]

[42]Notice at 8 ¶ 23.

The Commission should exercise its discretion in a manner which simplifies the analysis that needs to be undertaken. To the extent possible, the Commission should reduce the number of factors considered to avoid case-by-case determinations respecting a wide segment of the mobile services industry.[43]

The Notice first addresses carriers providing service to a restricted class of users. With respect to these entities, the legislative history confirms that the term "effectively available" is not limited to those situations where "broad" classes of users are served:

> The Conference Report deletes the word "broad" before "classes of users" in order to ensure that the definition of "commercial mobile services" encompasses all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public.[44]

The statute and legislative history further makes clear that limited eligibility services such as Specialized Mobile Radio and Private Carrier Paging are to be regulated under CMS, as are providers who, by choice, serve small or specialized user groups because they serve "narrow" classes of users.[45] Accordingly, the Commission should not "draw a distinction between limited-eligibility services that are . . . offered to small or specialized user groups."[46] It is exactly this type of technical distinction the Commission should avoid.

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[43]*See* note 33 *supra*.

[44]Conference Report, note 2 *supra*, at 496 (emphasis added).

[45]*See, e.g.*, Amended Section 332(c)(2)(B), 107 Stat. 394; Conference Report, note 2 *supra*, at 498; House Report, note 7 *supra*, at 260 n.2 and accompanying text.

[46]*See* Notice at 9 ¶ 25.